**IN THE COURT OF APPEAL OF TANZANIA**
**AT MTWARA**

**(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A. and KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 342 OF 2019**

**JOSEPH PAUL @ ALEX MAKUA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania, at Mtwara)**

**(Dyansobera, J.)**

**dated the 2nd day of May, 2019**
**in**
**Criminal Appeal No. 95 of 2018**

.....

## JUDGMENT OF THE COURT

20th & 25th November, 2020.

**MWAMBEGELE, J.A.:**

The appellant Joseph Paul @ Alex Makua was arraigned in the District Court of Lindi at Lindi in Lindi Region for the offence of attempted rape contrary to section 132 (1) and (2) (a) of the Penal Code, Cap 16 Revised Edition, 2002 (the Penal Code). The particulars of the offence part of the charge averred that on 16.12.2017, the appellant attempted to have carnal knowledge of a girl named RHM; a pseudonym we will use in this judgment to conceal her identity. He pleaded not guilty to the charge after which a full trial ensues. After the full trial, the trial court found that the

prosecution had proved the case against the appellant beyond reasonable doubt consequent upon which he was found guilty, convicted and sentenced to serve a statutory minimum prison term of thirty years. He unsuccessfully appealed to the High Court, for Dyansobera, J. upheld the conviction and sentence imposed by the trial court and dismissed the appeal entirely. Undaunted, the appellant preferred this appeal on five grounds of grievance which we paraphrase as under:

1. That the two courts below erred in law and fact by convicting the appellant on believing the evidence of PW4 a Village Chairman of Tangamano Mtwara and PW2 ZUHURA BAKARI at Makumbika Village who testified before the trial court that the appellant admitted to have committed the alleged offence without the statement from the appellant and produce it before the court as an exhibit in order to prove their allegation against the appellant;

2. That the two courts bellow erred in law and fact to convict the appellant because he pleaded not guilty when the charge was read over to him;

3. That the two courts bellow erred in law and fact to convict the appellant as the was not proved beyond reasonable doubt; and

4. That the two courts bellow erred in law and in fact by convicting and sentencing the appellant while all ingredients of attempted rape were not proved beyond reasonable doubt.

To appreciate the appeal before us and the decision we are going to make, we find it appropriate to narrate, albeit briefly, the material background facts leading to the appellant's arraignment as they can be gleaned from the record of appeal. These background facts are very simple and not difficult to comprehend. They go thus: on 16.12.2017 at Mahumbika village within the District and Region of Lindi, RHM (PW1), her mother Zuhura Bakari (PW2) and her brother named Adimu, were together working in their *shamba*. After working for some time, RHM and Adimu felt tired and wanted to go home. PW2 allowed them to go. Adimu went straight home but PW1, who was five months' pregnant and craved for unripe mangoes, went past a mango tree to pick some to quench her urge. While there, so she testified, the appellant appeared. He approached her and uttered to her in Kiswahili "nataka kukutomba"; literally translated: "I

want to fuck you" or, put more politely "I want to have sex with you". After that utterance, the appellant moved closer to her, started stripping her clothes off and managed to pull her gown (hijabu) and a *kitenge*. RHM screamed for help and PW2 heard her and went thither only to find the appellant on top of RHM still struggling. The record is not quite clear what transpired after that but the appellant was later arraigned for attempted rape and sentenced in the manner stated hereinabove.

The appellant's story before the trial court was materially different on some material aspects. He stated that prior to the material day, PW2 had hired him to cultivate his *shamba* and promised to pay him Tshs. 50,000/=. He had accomplished the work and on the material day, he went at PW2's residence to claim for his remuneration. Neighbours told him that she had gone to her *shamba*. He decided to follow her, got PW2 but, after examining the work done, she told him that she would pay him when they returned home. Having been told as such, the appellant, in the meantime, decided to cut some trees for his fence at home. While preparing a saddle to help him carry his luggage home, PW1 appeared. She moved closer to him and cried at the top of her voice that he wanted to rape her. PW2

then showed up in response to the alarm. It was the appellant's story that PW1 and PW2 framed him up so that PW2 could not pay the money she owed him.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Abdulrahman Msham, learned Senior State Attorney. In his submissions in chief, the appellant opted to only adopt his five-ground memorandum of appeal he lodged in the Court on 12.06.2020. He, however, reserved his right of rejoinder, need arising.

Supporting the conviction and sentence imposed by the trial court and upheld by the first appellate court, Mr. Msham submitted that the first and fifth grounds of appeal are new; they surface in this second appeal. He contended that the fifth ground could have been one based on law but that the appellant has not mentioned any specific provisions of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA) he claims to have been flouted. The learned Senior State Attorney thus urged us to ignore the first and fifth grounds unless the appellant clarifies which

specific provisions of the CPA he has in mind in which case he would be allowed to respond to the fifth ground.

With regard to the second ground; the complaint that the appellant was convicted without his pleading guilty to the charge, Mr. Msham dismissed the ground as without merit as, he argued, the appellant was found guilty after witnesses for the prosecution testified and the trial court found that the case against him was proved beyond reasonable doubt. It was not therefore that he was found guilty because of his plea, he argued.

The learned Senior State Attorney, in his response, combined the third and fourth grounds because, according to him, and to our mind rightly so, they are intertwined. He submitted that all the ingredients relating to the offence of attempted rape were proved. He mentioned these ingredients as intent to procure prohibited sexual intercourse with any girl or woman and manifesting that intention by threatening that girl or woman and implemented his intention. The learned Senior State Attorney cited our previous unreported decision in **Edwin Thobias Paul v. Republic**, Criminal Appeal No. 130 of 2017 and implored us to find that the

ingredients under the offence, with which the appellant was charged, were proved beyond reasonable doubt.

When we prompted Mr. Msham on the seemingly apparent contradictions in the evidence of the only two prosecution witnesses, he was quick to respond that the same are minor which did not go to the root of the offence. He added that, after all, PW1; the victim whose evidence is the one which the court should take as bringing true evidence of attempted rape, had already established the elements pertaining to the offence. He added that the appellant had already told the victim that he wanted to have sexual intercourse with her and manifested that intention by pulling her *kitenge* off. He thus submitted that the trivial contradictions that may have come thereafter should be glossed over.

Regarding the sentence imposed on the appellant, the learned Senior State Attorney told the Court that it was the minimum provided by the law; it should therefore not be meddled with.

In view of the above submissions, the learned Senior State Attorney urged us to find the appeal lacking in merit and dismiss it entirely.

In a short rejoinder, the appellant reiterated the story he told in defence at the trial. When we probed him why he did not cross-examine the two witnesses on the gist of his defence, the appellant did not have any useful response just like he did when probed on what he meant by the provisions of the CPA being disregarded by the two courts below; the subject of the fifth ground of appeal.

Having stated the material background facts to the arraignment of the appellant and summarized the submissions of both parties to this appeal, we should now be in a position to confront the grounds of appeal. We start with Mr. Msham's contention that we should disregard the first and fifth grounds of appeal in that they did not feature in the record. Indeed, the subject of complaint in the first ground of appeal is not backed by the record of appeal. The prosecution did field only two witnesses; the victim (PW1) and her mother (PW2). The record, contrary to the appellant's complaint, does not bear out that there testified as PW4 a Tangamano Village Chairman before whom the appellant supposedly confessed to have committed the offence. This is not evident on the record of appeal. We think the appellant was carried out by some

imaginary thinking of nonexistent facts that the Tangamano Village Chairman was called to testify for the prosecution while in fact he was not. We thus agree with the learned Senior State Attorney that the first ground of appeal should be overlooked. We did so in the unreported **Ramadhani Abdalla @ Namtule v. Republic**, Criminal Appeal No. 2019 when confronted with an akin situation; a decision we rendered in the ongoing sessions at Mtwara. We also do it here. The first ground of appeal is overlooked and will therefore not be considered.

The gist of the fifth ground of appeal is that the mandatory provisions of the CPA were not complied with. This ground was raised in the Court for the first time. Nonetheless, it being based on a legal complaint, we would have considered it even though it was not raised in the first appellate court – see: our decisions in **Abdul Athuman v. Republic** [2004] T.L.R. 151, **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004, **Ramadhani Mohamed v. Republic**, Criminal Appeal No. 112 of 2006, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012, **Richard Mgaya @ Sikubali Mgaya Republic**, Criminal Appeal No. 335 of 2008 and **Kazimili Samwel v. Republic**,

Appeal No. 570 of 2016 (all unreported), to mention but a few. When we asked the appellant which mandatory provisions of the CPA he had in mind when he drafted the fifth ground of appeal, he admitted that he, being a lay person at law, had no hunch at all. He intimated to the Court that the memorandum of appeal was prepared by someone else on his behalf. In the circumstances, we think, as Mr. Msham submitted, this ground, for its vagueness and generality, cannot be entertained. We overlook it as well.

We now turn to consider the second ground of appeal which is that the appellant was convicted despite the fact that he did not plead guilty to the charge. This ground will not detain us. As Mr. Msham rightly submitted, the appellant was found guilty and convicted not because he pleaded guilty to the charge, but because the court was satisfied that the two prosecution witnesses proved the accusations against him beyond reasonable doubt. This complaint has no merit at all. We dismiss it outrightly.

Next for consideration is the gist of the third and fourth grounds of appeal. We, like Mr. Msham, will consider these grounds conjointly. Our

starting point is section 132 (1) and (2) (a) of the Penal Code under which the appellant was charged. This provision reads:

> *"132.-(1) Any person who attempts to commit rape commits the offence of attempted rape, and except for the cases specified in subsection (3) is liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment.*
>
> *(2) A person attempts to commit rape if, with the intent to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by-*
>
> *(a) threatening the girl or woman for sexual purposes;*
>
> *(b) ..."*

It is apparent in the above cited provision that the offence of attempted rape is committed when a person's intention to commit the offence of rape is frustrated before he commits it fully. Mr. Msham submitted with some considerable tenacity that the two prosecution witnesses proved the ingredients of the charge under section 132 (1) and (2) (a) of the Penal Code to the hilt. We have serious doubts. We say so

because the testimony of the only two witnesses for the prosecution if juxtaposed with the appellant's defence at the trial, leaves a lot to be desired. It lacks cogency as to attract reasonable doubts in favour of the appellant. **First**, while the victim testified that the appellant fell her down and when PW2 responded to her alarm she found the appellant on top of the former, PW2 testified that she found the duo holding each other while the victim remained with her undergarment only.

**Secondly**, while the victim testified that after PW2 appeared and interrogated the appellant, PW2 called the Executive Officer and they went home together where they also called the Village Chairperson who ordered the arrest of the appellant, PW2 testified that she called the Executive Officer but had not airtime so she went to report to the said Executive Officer leaving behind the victim and appellant "holding each other" and that when she reported, the appellant was arrested.

**Thirdly**, while the victim testified that the appellant was arrested when PW2 reported to the Village Chairperson, PW2 testified that he was arrested after she reported to the Executive Officer. No reference is made by PW2 to the Village Chairperson.

**Fourthly**, while PW2 testified that she found PW1 in only an undergarment, PW1 did not say anything about the undergarment.

**Lastly**, what actually transpired at the scene of crime does not come out clearly. As we have held times and again relying on our decision in **Selemani Makumba v. Republic** [2004] T.L.R. 379 that in cases of this nature, the best evidence comes from the victim, unfortunately, in the case at hand, the victim is not explicit on what actually transpired. Let her testimony, as appearing at p. 18 of the record of appeal, paint the picture:

> *"At the mango tree I got unripe mangoes. I started eating them. Suddenly, I heard some footsteps. I did turn back and saw Joseph. Then I asked why he was coming to my back side. Joseph replied that he wanted to have sexual intercourse with me he used a words that "Nataka kukutomba" which means to have sexual intercourse with me. I asked him if such words were safe, but he told me that he wanted to have sexual intercourse with me. Suddenly, he touched my gown (Hijabu) and started pulling me. I was alarming calling my mother Zuhura Bakari. He undressed my kitenge which I wore on that day.*

*Suddenly Zuhura Bakari came at the scene where she found me on the ground while Joseph was on top of me ...."*

In relation to this, PW2 is recorded at p. 21 of the record of appeal as saying:

*"... I rushed there and found Joseph and RHM touched each other and Joseph had already undressed her gown (juba) and she remained with an underpant only."*

There could be some recording inelegancy on the part of the trial court, for we are not sure it was a *hijab* or a *juba*. While the trial court referred to the gown as *hijabu* in the testimony of PW1, it referred to the same gown as *juba* in the testimony of PW2.

Be that as it may, the dictionary meaning of the word *hijab*, as per Merriam-Webster Dictionary, is:

*"Traditional covering for the hair and neck that is won by Muslim women" - Merriam-Webster Dictionary*

If the gown referred to in evidence is the *hijab* as defined by the dictionary, we wonder why the appellant who wanted to rape the victim should remove the headcover first. Even if we take it to be a gown like any other gown, we wonder in which category of rapists we should put the appellant wanting to undress the gown first, not the undergarment. If this is true, which we think is not humanly possible, the appellant must have been a modest rapist who wanted to rape the victim but wished to undress her headcover or gown first and later her undergarment so as to rape her. That could have been humanly possible in a room and during an amicably consented sexual intercourse. We entertain doubts here in favour of the appellant.

The above discussion culminates into the conclusion that we do not think the evidence adduced by the two prosecution witnesses at the trial was sufficient enough to mount a conviction against the appellant. It is elementary that in criminal cases, the standard of proof is beyond reasonable doubt. In the case at hand, we are afraid, the prosecution did not meet this minimum threshold. This appeal, for failure by the

prosecution to prove the case to the required standard, that is, beyond reasonable doubt, will not succeed.

Before we pen off, we find it irresistible to comment on the punishment for attempted rape as juxtaposed to punishment for actual rape. Both offences attract a sentence of thirty years in prison. This Court has more often than not pronounced itself that the minimum punishment of thirty years in jail for the offence of attempted rape is far on the high side and proposed a lower sentence – see our decisions in **Edwin Thobias Paul** (supra), **Abas Selemani Mbinga v. Republic**, Criminal Appeal No. 250 of 2008, **Kalos Punda v. Republic**, Criminal Appeal No. 153 of 2005 and **Isidori Patrice v. Republic**, Criminal Appeal 224 of 2007 (all unreported). In **Kalos Punda** (supra) for instance, we observed:

> *"It appears to us that the Sexual Offences Special Provisions Act, 1998 does not provide for lesser sentences for attempted offences, in this case, attempted rape contrary to section 132 (1) of the Penal Code to differentiate attempted rape from the offence of rape contrary to sections 130 and 131 of the Penal Code. In practice, however, attempted offences ordinarily carry a less severe penalty as is*

*the case with the offence of murder contrary to section 196 which carries a capital punishment of death but offences lesser than murder such as manslaughter, and, or attempted murder have lighter punishments."*

Likewise, in **Abas Selemani Mbinga** (supra) we observed:

*"In so far as the sentence of thirty years imprisonment (in place of the five years originally imposed by the trial court) imposed by the first appellate court is concerned, we find it to be the mandatory minimum provided for under the law. It may appear to be harsh and excessive but we cannot rule otherwise."*

We climaxed our prayer to the law-making authority to amend the sentence in respect of the offence of attempted rape in **Edwin Thobias Paul** (supra) in the following terms.:

*"... we have felt imperative to pronounce ourselves that after carefully weighing the ingredients of the offence of attempted rape, particularly taking into consideration that something will have prevented the offender from implementing his plan, we think that the minimum sentence of 30 years*

*imprisonment is on the higher side. This is predominantly so when we take into account the fact that in all other offences of attempts, the sentences are fairly low. We have in mind offences like attempted murder which has no mandatory minimum sentence; attempted robbery which attracts a lower sentence than that of the offence of robbery; and several other such offences. It is astounding therefore, to find that the offence under consideration carries the same punishment like a fully-fledged offence of rape in respect of victims over 18 years. Influenced by this situation,* ***we are suggesting that maybe it is time the law makers considered this point so that they can do something about this aspect with a view to reducing it."***

[Emphasis added].

[see also: **Robert N. Mbwilo v. Republic,** Criminal Appeal No. 154 of 2017 (unreported)].

We thus reiterate that the law-making body should think of amending the punishment for attempted rape to be commensurate with other attempted offences. It does not make any legal sense why the punishment for rape is the same as punishment for attempted rape.

For the reasons stated earlier, we find this appeal meritorious and allow it. The conviction of the trial court upheld by the first appellate court is quashed and the sentence meted out to the appellant is set aside. Consequently, we order that the appellant Joseph Paul @ Alex Makua be released from prison custody forthwith unless held there for some other offence.

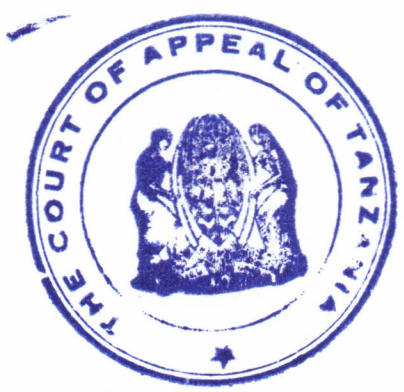
**DATED** at **MTWARA** this 24th day of November, 2020.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Judgment delivered this 25th day of November, 2020 in the presence of the Appellant in person and Mr. Paul Kimweri, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**